

No. 20982
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE, JUDA GLASNER.

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TOPICAL INDEX

	Page
Introductory	1
Jurisdiction as claimed by appellant in the District Court	2
Statement of the case	3
Argument of the case	11
I.	
Lack of appellant individual's standing to sue for alleged interference with corporation's business	11
II.	
Immunity of appellee Glasner, California State Kosher Food Law Representative	18
III.	
Pleading conclusions of law	27
Conclusion	28
Appendix. California State Personnel Board Spec- ification for Class of Kosher Food Law Repre- sentative	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Barr v. Mateo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 1434	22, 26
Bershad v. Wood, 290 F. 2d 714	23
Beyerbach v. Juno Oil Co., 42 Cal. 2d 11, 265 P. 2d 1	14
Birnbaum v. Trussell, 347 F. 2d 86	27
Brictson v. Woodrough, 164 F. 2d 107, cert. den. 334 U.S. 849, 68 S. Ct. 1500, 92 L. Ed. 1772 ..	13
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528	14
Cohen v. Norris, 300 F. 2d 24	23, 26
Cooper v. O'Connor, 69 App. D.C. 100, 99 F. 2d 135, 118 A.L.R. 1440, cert. den. 305 U.S. 642, 59 S.Ct. 146, 83 L.Ed. 414	9, 19
Cromelin v. Fulcher, 192 F. 2d 40	13
Erlich v. Glasner, 352 F. 2d 119	1
Erlich v. Municipal Court, 55 Cal. 2d 552, 11 Cal. Rptr. 758, 360 P. 2d 334	17
Gagnon v. Nevada Desert Inn, 45 Cal. 2d 448, 289 P. 2d 466	13
Glickman v. Glasner, 230 Cal. App. 2d 120, 40 Cal. Rptr. 719	8, 19
Green v. Victor Talking Machine Co., 24 F. 2d 378 ..	12
Gregoire v. Biddle, 177 F. 2d 579	22, 23
Halliburton Company v. Norton Drilling Company, 302 F. 2d 431, cert. den. 374 U.S. 829, 83 S. Ct. 1870, 10 L. Ed. 2d 1052	27
Hardy v. Vial, 48 Cal. 2d 577, 311 P. 2d 494	20
Hausman v. Buckley, 299 F. 2d 696	14

	Page
Hoffman v. Halden, 269 F. 2d 280	19, 23
International Harvester Company v. Kansas City, 308 F. 2d 35, cert. den. 371 U.S. 948, 83 S. Ct. 503, 9 L. Ed. 2d 498	27
Keller v. Schulte, 47 Cal. 2d 801, 306 P. 2d 430	14
Koster v. Warren, 297 F. 2d 418	13, 14
Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492	23, 26
Norton v. McShane, 332 F. 2d 855	23
O'Campo v. Hardisty, 262 F. 2d 621	19
Ove Gustavsson Contracting Co. v. Floete, 299 F. 2d 655	23
Powell v. Workmen's Compensation Bd. of State of New York, 327 F. 2d 131	27
Rhodes v. Houston, 202 F. Supp. 624, aff'd, 309 F. 2d 959, cert. den. 372 U.S. 909, 83 S. Ct. 724, 9 L. Ed. 2d 719	24
Rhodes v. Meyer, 334 F. 2d 709, cert. den. 13 L. Ed. 2d 186	24
Robichaud v. Ronan, 351 F. 2d 533	26
Royal News Company v. Schultz, 230 F. Supp. 641	15
Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401	12
South Carolina Council of Milk Producers, Inc. v. Newton, 241 F. Supp. 259	13
Sutter v. General Petroleum Corp., 28 Cal. 2d 525, 170 P. 2d 898	14
Toboni v. Pennington Millinery Co., 172 Cal. App. 2d 47, 341 P. 2d 845	13, 14

Cyclopedia	Page
13 Fletcher Cyclopedia on Corporations (1961 ed.), Sec. 5910, p. 366	12
Rules	
Federal Rules of Civil Procedure, Rule 43(a)	8
Statutes	
Corporations Code, Sec. 834	13, 14
Government Code, Sec. 18000	7
Health and Safety Code, Sec. 26518.5	5
Penal Code, Sec. 240	5
Penal Code, Sec. 383(b)	4, 5, 6, 17, 18
United States Code Annotated, Title 28, Sec. 1331 ..	2
United States Code Annotated, Title 28, Sec. 1343- (3)	2
United States Code, Title 42, Sec. 1983	9
United States Constitution, Fourteenth Amendment, Sec. 1	3, 5, 10

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BRIEF FOR APPELLEE, JUDA GLASNER.

INTRODUCTORY.

Plaintiff, David Erlich, appeals from the judgment dismissing the action brought by him as an individual against several defendants, including appellee, Juda Glasner. This brief is on behalf of appellee Glasner.

A prior dismissal was reversed because the trial court had stated no specific reason for dismissal and with the suggestion that amendment of appellant's complaint might be sought. (*Erlich v. Glasner*, 9 Cir., 1965, 352 F. 2d 119, 122-123.) Appellant filed an amended complaint. [Tr. pp. 2 *et seq.*] The trial court, pursuant to motions of the respective defendants, rendered its judgment of dismissal in which three grounds or reasons were specified as hereafter noted [Tr. pp. 35-37] from which judgment plaintiff took this appeal. [Tr. p. 41.]

JURISDICTION AS CLAIMED BY APPELLANT IN THE DISTRICT COURT.

Appellant's pleading is entitled "Amended Complaint For Violation of Civil Rights (42 USCA 1983)". By paragraph I thereof, appellant alleged [Tr. p. 2] that the District Court "has jurisdiction of this cause pursuant to 28 USCA 1343(3) which provides for actions to redress the deprivation, under power of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States; and pursuant to 28 U.S.C.A. Sec. 1331 which provides for actions arising under the Constitution of the United States", followed by allegation that the amount in controversy exceeds \$10,000.00. By paragraph IX of his amended pleading, appellant alleged [Tr. p. 6] that defendants' interference with the business of West Coast Poultry Company [a corporation—Tr. p. 3 "III"] is a direct interference with plaintiff's right to operate his business and earn a livelihood for himself and family and that defendants' acts "deprived plaintiff of his privileges and immunities, guaranteed to him as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States;" and proximately caused damage and injuries to "his right and ability to earn a livelihood [sic] for himself and family, all to plaintiff's damage in the sum of \$250,000.00."

The foregoing statutes and constitutional provision are those which appellant alleged as a basis for the jurisdiction of the District Court in this cause.

STATEMENT OF THE CASE.

Appellant is the sole plaintiff and his action was brought and is sought to be maintained by him solely as an individual.

Appellant evidently claims that he had been deprived of his *privileges and immunities* as a citizen of the United States guaranteed to him as such under the Constitution, Amendment 14, section 1. [Tr. p. 6, "IX", as heretofore stated.]

Appellant's claimed jurisdictional basis is as above noted. The remaining allegations of his amended pleading are as follows:

From November, 1947, to August, 1960, appellant was engaged in the business of slaughtering and dispensing poultry, kosher and non kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company. [Tr. p. 3, "II".]

In August, 1960, West Coast Poultry was organized as a California corporation. Appellant and his wife own all the stock of said corporation. Appellant is president and general manager of the corporation. It is a continuation of the poultry business of plaintiff at the same address. [Tr. p. 3, "III".]

Defendants Glasner, Etner and Zilberstein are "doing business" under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles. [Tr. p. 3, "IV".]

Defendant Glasner is employed by the Department of Public Health of the State of California as the kosher food law representative and his duties consist of investigation of violations of the kosher food laws of the

State of California pursuant to §383b of the California Penal Code. [Tr. p. 3, "V".] (Parenthetical note: See California Health and Safety Code, sec. 214, reading: "The State Department of Public Health shall enforce the provisions of Section 383b of the Penal Code.")

Defendants contend that they are Orthodox Rabbis and that only they should have control to "dictate" what is and what is not kosher. Defendants' "purposes" "is to prevent plaintiff and other kosher poultry dealers from using the services of any other rabbi except themselves" and to compel plaintiff and others to retain only defendants' services. [Tr. p. 3, "VI".]

To compel kosher poultry dealers in Los Angeles County to retain defendants' rabbinical services, defendant Glasner, "acting in his capacity as kosher food law inspector of the State of California, but not within the course of his duties as kosher food law representative", has caused issuance of criminal complaints charging violations of California Penal Code, §383b, to those dealers who do not use defendants' rabbinical services. [Tr. p. 4, "VII".]

On or about April 1, 1964, defendant Glasner, "while acting in his official capacity as kosher food law representative of the State of California, but not within his duties as kosher food law representative," and all defendants, acting under color of law, entered into an "unlawful" combination and conspiracy for the purpose of depriving plaintiff of his privileges and immunities guaranteed every "citizen" of the United

States by the Constitution, Amendment 14, section 1, and in pursuance thereof, have committed the following acts: (a) Communicated with customers of "plaintiff and West Coast Poultry Company, a California corporation," and advised them that if they purchased kosher products from plaintiff or said corporation citations would be issued against them by defendant Glasner for violating Penal Code §383b. (b) Circulated advertisements in newspapers advising the public not to purchase plaintiff's kosher products. (c) Filed two criminal complaints against plaintiff, "falsely accusing him of violating §383b of the Penal Code." (d) Filed criminal complaints against employees of plaintiff and West Coast Poultry Company, a corporation, "falsely charging them with violating" California laws to coerce these employees to leave said employment. (e) Charged one Abramovitz, who was employed as "schoichet" and West Coast Poultry Company in the Los Angeles Municipal Court with aiding and abetting poultry dealers with violating Penal Code §383b and in the Beverly Hills Municipal Court with violating Penal Code §240 and Health & Safety Code §26518.5, with the result that said Abramovitz left the employ of plaintiff rather than be a "constant defendant in criminal actions." (f) Filed a criminal complaint against one Glickman, "a schoichet employed by plaintiff and West Coast Poultry Company," charging him in the Los Angeles Municipal Court with aiding and abetting unidentified kosher butchers to violate Penal Code §383b and as a result Glickman left said employ (g) Offered payment to

Salter and Reyna, "former employees of the plaintiff," to appear as witnesses against plaintiff and falsely testify that he is not slaughtering chickens pursuant to orthodox Hebrew religion requirements. (h) Defendants Orlanski and Friedman were former employees of plaintiff; defendant Glasner caused to be issued in the Los Angeles Municipal Court a criminal complaint charging them with aiding and abetting kosher poultry dealers with violating California Penal Code §383b; "the remaining defendants" advised the defendants Orlanski and Friedman that if they would cooperate with them against plaintiff the criminal complaint would be dismissed. (i) Entered into a champertous agreement with three competitors of "plaintiff and West Coast Poultry Company" to commence an action against West Coast Poultry Company for an injunction to prevent that corporation from selling kosher poultry unless they retained defendants' rabbinical services; such action was commenced in the Los Angeles Superior Court, being action No. 825,740; said three competitors have no interest in said action and commenced it at defendants' request; said action is sponsored and financed by defendants. [Tr. pp. 4-6, "VIII".]

The interference by defendants "with the business of the West Coast Poultry Company is a direct interference with the right of the plaintiff to peacefully operate his business and earn a livelihood [sic] for himself and his family" and the defendants' acts "under color of law as hereinabove set out deprived the plaintiff of his privileges and immunities, guaranteed to him

as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States,” and as a proximate result of the “overt acts hereinabove set forth, plaintiff has sustained damages and injuries to his business and right and ability to earn a livelihood [sic] for himself and his family, all to plaintiff’s damage in the sum of \$250,000.00.” [Tr. pp. 5-6, “IX”.]

The conduct of defendants was “opprobrious, wilful and malicious” and plaintiff requests punitive damages of \$100,000.00. [Tr. p. 6, “X”.]

These constitute the allegations of plaintiff’s amended complaint.

Three separate motions to dismiss the action were filed, each being based on the ground of failure to state a claim against the particular movant or movants upon which relief could be granted. [Tr. p. 8, Glasner; p. 15, Etner; p. 29, Orlanski, Friedman, Zilberstein, Bauman, and United Orthodox Rabbinat of Greater Los Angeles.] The motion of Glasner was based on the notice, points and authorities in support thereof [Tr. pp. 10-12 and 31-33], and the pleadings, records and other documents in the cause. [Tr. p. 8, line 31, to p. 9, line 1.] Among the records and documents on file (attached as Exhibit A to Glasner’s motion to dismiss the original complaint—9th Cir., case number 19872, Tr. p. 23) was a copy of the “California State Personnel Board Specification for Class of Kosher Food Representative”, an official act of the Board made pursuant to California Government Code, section 18000,

and which is judicially noticed (Rule 43(a), Fed. Rules Civ. Proc.), thereby showing the duties attached to the position of Kosher Food Law Representative.¹ In

¹Thereunder, as Kosher Food Law Representative, appellee Glasner was invested with discretionary duties. Thus, in *Glickman v. Glasner* (1964), 230 Cal.App.2d 120, 40 Cal.Rptr. 719, after quoting from the "California State Personnel Board Specification for the Class of Kosher Food Law Representative" in footnote 2, it was held (230 Cal.App.2d at pp. 125-127, 40 Cal.Rptr. at pp. 723-724):

"The duties of the Kosher Food Law Representative were discretionary in nature. The trial judge, in her memorandum opinion, stated:

"“(1) Defendant Glasner’s qualification for his employment as Kosher Food Inspector cannot be attacked in this proceeding. The determination of the qualifications for public employment and the determination of discipline and dismissal of such personnel rests in the hands of the State Civil Service and Personnel Boards, not in the courts at the instance of private litigants. [Citations.]

"“(2) Defendant Glasner is completely immune from liability if his publication of Exhibit 1 were within the scope of his discretionary duties, regardless of his personal motivations, good or ill. (*Lipman v. Brisbane Elem. School Dist.*, 55 Cal. 2d 224 [11 Cal.Rptr. 97, 359 P.2d 465] (1961); *Hardy v. Vial*, 48 Cal.2d 577 [311 P.2d 494, 66 A.L.R.2d 739] (1957).)

"“The duties of a Kosher Food Representative are stated by the State Personnel Board, set forth in defendants’ affidavit, read with Penal Code Section 383b and with Health and Safety Code Section 214. Those duties specifically include advising interested persons “such as kosher meat and poultry packers, wholesalers, retailers, and restaurateurs on application of the State Kosher Food Law * * *.” The Kosher Food Inspector also “conducts investigations, gathers, assembles, and reports facts and evidence.” (Exhibit 1 to defendant Glasner’s affidavit.)

"“These duties obviously involve the exercise of discretion. In carrying out the obligations of his office, the inspector must decide what facts he shall gather, which investigations will be made, and what reports in his reasoned judgment should be made to bring about compliance with Penal Code Section 383b. [Citations.]

"“ . . .

"“The principle established by these cases may work hardship from time to time, but were the rule otherwise greater mischief would result . . .

Cooper v. O'Connor (D.C. Cir., 1938), 69 App. D.C. 100, 99 F.2d 135, 118 A.L.R. 1440, cert. den. 305 U.S. 642, 59 S.Ct. 146, 83 L.ed. 414, it was said (99 F.2d at p. 138), "we may properly take judicial notice of the official duties of each of the appellees and thus determine whether the acts charged in the declaration fell within the general scope of their authority." For convenience of the Court, the pertinent portions of said "California State Personnel Board Specification for Class of Kosher Food Law Representative" are quoted and set forth in the Appendix to this brief.

The motions were heard and argued February 28, 1966. [Tr. p. 40.] Judgment of dismissal was entered March 10, 1966, on the stated and specified grounds and reasons that [Tr. pp. 35-37]:

1. The real party in interest is not plaintiff individual but is West Coast Poultry Company, a corporation, which is shown by the amended complaint's allegations to be the one which would suffer damage if the allegations were true; and a corporation has no cause of action under 42 USC 1983 or any other Federal statute for alleged violation of its civil rights.

2. Appellee Glasner at all times material hereto was a duly qualified, appointed and acting official of the

"Taking the statutes, the office, and the duties as we find them, it is plain that this defendant is not exposed to liability in this case. Accordingly, the Court grants defendant Glasner's Motion for Summary Judgment. There is no triable issue of fact."

"We concur with the trial judge."

Petition for hearing by the California Supreme Court was denied on December 9, 1964.

California Department of Public Health, being Kosher Food Inspector; all acts charged to him in the amended complaint, if true, were committed by him in the course and scope of his employment in such official capacity; all acts charged to him by the amended complaint were discretionary acts; and as to all acts charged to him by the amended complaint appellee Glasner is protected by immunity by the laws of California.

3. The allegations of paragraph VIII of the amended complaint to the effect that defendants entered into an unlawful combination and conspiracy for the purpose of depriving appellant of his privileges and immunities guaranteed every United States citizen by section 1 of the 14th Amendment to the United States Constitution are conclusions of law, unsupported by any proper and sufficient factual allegations.

From the judgment of dismissal, plaintiff took this appeal.

Discussion herein will be had in the order specified and contained in the trial court's judgment of dismissal, rather than in the order set forth in appellant's opening brief.

ARGUMENT OF THE CASE.

I.

Lack of Appellant Individual's Standing to Sue for Alleged Interference With Corporation's Business.

In paragraphs II and III of his amended pleading, appellant alleges that from November, 1947, until August, 1960, he was engaged in the business of slaughtering and dispensing poultry, kosher and non-kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company; that in August, 1960, West Coast Poultry Company was organized as a California corporation; that appellant is president and general manager of said corporation; and that the corporation is a continuation of said poultry business. [Tr. p. 3, "II" and "III".]

It thus appears that since August of 1960 the business involved has been and is that of the corporation, West Coast Poultry Company. It also appears that the alleged acts are asserted to have taken place on or about April 1, 1964 [Tr. p. 4, line 10], at a time when the corporation was conducting the business. It is true that appellant alleged that he is one of the two stockholders of the corporate stock and is the president and general manager of the corporation. However, this does not make the business activities or customers or other business affairs those of appellant as an individual. These are and belong to the corporation which is the concern carrying on the business as alleged in appellant's pleading.

Appellant, as an individual, is the sole party plaintiff. It is evident that he seeks to ignore the corporate entity. That may not be done by him, either as stockholder or president or general manager. Appellant has no right as an individual to sue for redress of that which is the corporation's concern. These are the corporation's affairs, not appellant's.

"The fact that a stockholder owns all, or practically all, or a majority of the stock, does not of itself authorize him to sue as an individual." (13 Fletcher Cyc. Corp., 1961 ed., p. 366, §5910; *Green v. Victor Talking Machine Co.*, 2 Cir., 1928, 24 F.2d 378, 380.) As observed in the anti-trust action in *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, D.C., S.D.N.Y., 1961, 193 F. Supp. 401, 407:

"... In legal contemplation, the motion picture theatres injured by the alleged conspiracy were under control of the three sublessee corporations, and only those corporations were entitled to redress of the wrongs inflicted. The fact that plaintiffs were the landlords of the theatres avails them naught. [Citations.] Nor is plaintiffs' ownership of the sublessee corporations of any aid, for even a shareholder who owns the corporation cannot sue in its stead. [Citation.] Nor are plaintiffs' direct dealings with the defendants and their management of the business of the sublessees sufficient to confer upon them standing. 'Shareholders and officers of corporations as well as creditors and landlords have been held not to have standing to sue for treble damages.' [Citation.] The fact that plaintiffs have more than one of the above statutes does not lead to the conclusion that they have stand-

ing to sue. Plaintiffs created corporations to hold the theatres under subleases in order to obtain the benefits of such an arrangement. They may not now successfully pierce the veils of the corporate sublessees to avoid the burdens of the arrangement."

Or, as expressed in *South Carolina Council of Milk Producers, Inc. v. Newton*, D.C., E.D.S.C., 1965, 241 F.Supp. 259, 263, the rule is "an effective bar to suits by shareholders, officers, employees, and creditors, for personal losses caused by injury to the corporation. The cause of action accrues only to the corporation for which it can bring suit, or by a shareholder's derivative suit." To allege that the acts of a defendant or defendants have caused impairment or even destruction of the corporation's business or assets which thereby renders the stockholders' property (stock) less valuable or valueless or a creditor less secure or without security or an employee with lessened or no employment, does not operate to invest any of these persons with the corporation's cause or rights. (*Ibid.*, and cases cited; see also, *Gagnon v. Nevada Desert Inn*, 1955, 45 Cal.2d 448, 289 P.2d 466; *Toboni v. Pennington Millinery Co.*, 1959, 172 Cal.App.2d 47, 341 P.2d 845; *Cromelin v. Fulcher*, 5 Cir., 1951, 192 F.2d 40; *Bricton v. Woodrough*, 8 Cir., 1947, 164 F.2d 107, cert.den. 334 U.S. 849, 68 S.Ct. 1500, 92 L. ed. 1772.)

The amended complaint shows that the corporation is a California corporation. Section 834, California Corporations Code, regulating the bringing of suits for redress of wrongs committed against a corporation, is not merely procedural but is held to apply to an action brought in the federal courts. (*Koster v. Warren*,

9 Cir., 1961, 297 F.2d 418, 419, citing *Cohen v. Beneficial Industrial Loan Corporation*, 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528; see also *Hausman v. Buckley*, 2 Cir., 1962, 299 F.2d 696, 700, *et seq.*) The courts hold that the corporation's "rights, not those of the nominal plaintiff, are to be adjudicated, and the court has no jurisdiction to adjudicate its rights in its absence as a party." (*Beyerbach v. Juno Oil Co.*, 1954, 42 Cal.2d 11, 28, 265 P.2d 1, 11; *Keller v. Schulte*, 1957, 47 Cal. 2d 801, 803, 306 P.2d 430, 432.) Appellant here has not complied with section 834, California Corporations Code.

Appellant's suit does not purport to a derivative suit on behalf of the corporation but is by himself solely as an individual. Appellant cites *Sutter v. General Petroleum Corp.*, 1946, 28 Cal.2d 525, 170 P.2d 898, for the proposition that a cause of action may exist "in favor of both the corporation and the stockholder." In *Toboni, supra*, 172 Cal.App.2d at p. 51, 341 P.2d at p. 348, it pertinently was said:

"Plaintiff mistakenly relies upon *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525 [170 P.2d 898, 167 A.L.R. 271]. It does not support her thesis. There the plaintiff sued for damages directly and individually sustained by him, caused by the fraud of the defendant which induced plaintiff to organize and invest in a corporation to take over an oil and gas lease and abandon his own petroleum development projects. The stock in the new corporation thus formed became valueless because of that fraud."

That is in nowise akin to that which here is presented.

Of course, the *owner* of a business has a property right therein with the right to make profit (livelihood) therefrom. But appellant is not the *owner*; the *corporation*, West Coast Poultry Company, is the *owner* of the business; and appellant's status, whether as a stockholder or president or general manager of that corporation, gives him no right as an individual to seek redress for any alleged damage done to the corporation. For example, *Royal News Company v. Schultz*, U.S.D.C., Mich., 1964, 230 F.Supp. 641 relied on by appellant as supportive of his right as an individual, was an action for injunction brought *by the corporation* whose products (books) unlawfully had been seized, thus depriving the corporation of its property without due process of law. The suit was by the corporation, not by any stockholder or officer or employee and the decision nowhere purports to invest these latter persons with any right to seek redress as individuals for that done to the corporation.

Appellant at great length argues that *his* business and *his* right to earn from that business are somehow involved because he and his wife are the sole stockholders and he is president and general manager of the corporation. Nowhere, however, does it appear that appellant himself is engaged in business. It expressly and affirmatively is alleged that the corporation was formed in 1960 and is a continuation of the business formerly

conducted by appellant. It is the corporation's business—not any business of appellant—that is involved and being conducted by the corporation. If there be any "interference" with that business or with the owner's right to earn a "livelihood" therefrom, it is an interference with the corporation's rights, not with appellant's individual rights. Appellant confuses the fact that there is a corporate entity and makes assertions that interference with the corporation constitutes interference with him as an individual. He, as an individual, cannot ignore the corporation or the fact that it is the corporation which is conducting the business.

In concluding his discussion of this matter, appellant claims (O. B. p. 20) that there are two allegations made of "overt acts" committed "directly to plaintiff, rather than through his corporation."² He states that the pleading alleged that defendants communicated with customers of the plaintiff. However, the allegations show that West Coast Poultry Company, a corporation, was and is conducting the business. The *reference* to "customers of the plaintiff and the West Coast Poultry Company, a California corporation," made in the referred-to paragraph VIII of his pleading [Tr. p. 4, lines 19-20], clearly and obviously is a reference to customers of the business conducted by the corporation—for that is the only business alleged to exist in the pleading. His second claimed "direct" overt act, "that criminal complaints were filed against the plaintiff and not against the corporation", refers to the allegation that two criminal complaints were filed against plaintiff for violation of California Penal Code,

²Note: Appellant refers to the corporation as "*his*" corporation. This fallacious and erroneous conception appears to be the main basis for his argument in his point II.

section 383b. [Tr. p. 4, lines 27-28.] (See *Erlich v. Municipal Court*, 1961, 55 Cal.2d 552, 11 Cal.Rptr. 758, 360 P.2d 334, upholding the constitutionality of the code section and refusing to prevent prosecution of appellant thereunder.) Certainly, the Civil Rights laws do not give any citizen the right to be immune from criminal charges being filed against him. The mere filing of such charges could not possibly have deprived appellant of any civil right. The appellant's pleading does not allege whether he ultimately was found guilty or not guilty of the charges filed against him. If found not guilty, he was not deprived of any civil right. (He does not claim that he was mishandled or abused, physically or mentally, or was deprived of counsel, etc., by appellee Glasner or any official or any of the defendants.) If found guilty, he was not deprived of any civil right for he violated the provisions of section 383b, California Penal Code, in such event. His allegation that two criminal charges were filed against him does not allege any violation of any civil right.

By paragraph IX of his pleading, appellant alleges, "That the interference by these defendants *with the business of the West Coast Poultry Company* is a direct interference with the right of the plaintiff to peaceably operate his business and earn a livelihood [sic] for himself and his family" and it is on this basis that he claims his "civil rights" (privileges and immunities) have been infringed. His suit does not purport to be a derivative one although it thus seeks redress for alleged interference with the business of the corporation. The trial court correctly held that the real party in interest was the corporation, not appellant individual, for it is the corporation which would suffer the dam-

age sought. Appellant as an individual has no standing to sue. For this reason alone, his suit properly was dismissed.

II.

Immunity of Appellee Glasner, California State Kosher Food Law Representative.

Appellant's amended pleading affirmatively alleges that appellee Glasner is the kosher food law representative employed by the California Department of Health. His duties include investigation of violations of the kosher food laws of California pursuant to California Penal Code, section 383b. (See also Appendix to this brief.) It is alleged that on or about April 24, 1964, appellee Glasner, "while acting in his official capacity as kosher food law representative of the State of California, but not within his duties as kosher food law representative", and all of the defendants did certain acts heretofore summarized in the Statement of the Case.

As kosher food representative of California, appellee Glasner is immune from suit in performance of his duties which rule "applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes. (*White v. Towers*, 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R.2d 636].)" (*Lipman v. Brisbane Elementary School Dist.*, 1961, 55 Cal.2d 224, 233, 11 Cal.Rptr. 97, 102, 359 P.2d 465, 470; *Tietz v. Los Angeles Unified Sch. Dist.*, 1965 238 Cal.App.2d . . . , 238 A.C.A. 1028, 1032, 48 Cal.Rptr. 245, 248.) The immunity of the kosher food law representative from suit for discretionary acts and that his duties are discre-

tionary in nature are well discussed and considered in *Glickman v. Glasner*, *supra*, footnote 1, 230 Cal.App.2d 120, 40 Cal.Rptr. 719. Argument there, as here, was made that his employment did not encompass that which was charged against him in the civil suit for damages. The argument was squarely met and determined against plaintiff Glickman in that case.

In *Hoffman v. Halden*, 9 Cir., 1959, 269 F.2d 280, the complaint alleged both a deprivation of privileges and immunities and a denial of due process of law. (See p. 286, footnote, allegation "VII".) On pages 298-300, discussion was had of the immunity of state officials. It was held (pp. 299-300):

"A broad holding that all state officials enjoyed immunity would be an improper approach. . . .

"The approach of granting immunity to government officials for discretionary acts done within the scope of their authority, seems a proper one. . . . This approach says we will not inquire, subjectively—into their state of mind—where they are exercising a discretionary function."

This Court then cited the cases of *Cooper v. O'Connor*, *supra*, 1938, 69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440, and *O'Campo v. Hardisty*, 9 Cir., 1958, 262 F.2d 621, and stated that although neither were civil rights cases, "we are content to follow *O'Campo v. Hardisty*, *supra* and *Cooper v. O'Connor*, *supra*, in this case and extend immunity to a state officer for his discretionary acts within the scope of his authority."

In *Cooper v. O'Connor*, *supra*, on pages 139-140 of 99 F.2d, it was held that appellee Simon, agent and investigator of the Federal Bureau of Investigation, and

appellees O'Connor, Lyons, Awalt, Barse and Baldwin, agents and officers of the Comptroller, were immune from suit claiming damages for causing indictments to be returned against appellant for asserted violations of the banking laws. In connection with those in the Comptroller's office, it was said in part on page 140:

"The administration of criminal justice would be impossible without the active participation of public officials representing the departments concerned with the enforcement of particular laws. . . . By reason of their performance of duties clearly assigned, the facts and evidence which suggest criminal conduct upon the part of bank officials are revealed to such officers . . . In the case of an official, his failure to act under such circumstances would, in addition, constitute serious malfeasance in office. In the present case, appellees were charged with responsibility for the collection and conservation of the assets of a bank. It would be absurd to contend that the duties of such an officer — so charged and so peculiarly aware of facts suggesting that certain persons were engaged in the spoilation of those very assets — should stop abruptly at the point where the initiation of criminal proceedings became necessary to protect such assets. [Citations.]"

In *Hardy v. Vial*, 1957, 48 Cal.2d 577, 582-583, 311 P.2d 494, 496-497, it was held:

" . . . The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in *criminal* actions. First recognized for the protection of judges (*Bradley v. Fisher*, 13 Wall.

(U.S.) 335 [20 L.Ed.646]), it has been extended by the federal decisions to all executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment. (*Spalding v. Vilas*, 161 U.S. 483 [16 S.Ct. 631, 40 L.Ed. 780]; *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557; *United States, to Use of Parravicino v. Brunswick*, 69 F.2d 383; *Jones v. Kennedy*, 121 F.2d 40 [73 App. D.C. 292]; *Farr v. Valentine*, 38 App. D.C. 413; *De Arnaud v. Ainsworth*, 24 App.D.C. 167 [5 L.R.A.N.S. 163]; see *Papagianakis v. The Samos*, 186 F.2d 257, 260-262.) In this state *Downer v. Lent*, 6 Cal. 94 [95 Am.Dec. 489], and *Oppenheimer v. Arnold*, 99 Cal.App.2d 872, 874 [222 P.2d 940], recognize the same wide immunity. (Cf. also *Wilson v. Sharp*, 42 Cal.2d 675, 679 [268 P.2d 1062].)

“The policy underlying the doctrine of absolute immunity is well stated by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581, as follows: ‘It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable

danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'

"... It should be noted in this connection that 'What is meant by saying that the officer must be acting within his power [to be entitled to immunity] cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.' (*Gregoire v. Biddle*, 177 F.2d at p. 581.) ..."

Gregoire v. Biddle, *supra*, 2 Cir., 1949, 177 F.2d 579, frequently has been cited, quoted and followed. Prefaced by the statement that, "The matter has been admirably expressed by Judge Learned Hand", the Supreme Court in *Barr v. Mateo*, 1959, 360 U.S. 564, 571-572, 79 S.Ct. 1335, 3 L.ed. 2d 1434, quoted and fol-

lowered the foregoing from *Gregoire*. (See also: *Bershad v. Wood*, 9 Cir., 1961, 290 F.2d 714, 719, stating, "The Supreme Court's acceptance of *Gregoire v. Biddle* impels us to the conclusion that the law has changed, and that it is now considered wise to leave some government agents entirely free from suit when they are acting within an area entrusted to their discretion."; *Ove Gustavsson Contracting Co. v. Floete*, 2 Cir., 1962, 299 F.2d 655, 658; *Norton v. McShane*, 5 Cir., 1964, 332 F.2d 855, 858, where, after quoting from *Gregoire*, it was said, "This statement of the law is made binding on us by the express approval afforded it by the Supreme Court in *Barr v. Matteo*, 1959, 360 U.S. 571-572, 79 S.Ct. 1335", and citing *Bershad* in the accompanying footnote.)

Appellant states that *Hoffman v. Halden*, *supra*, 9 Cir., 1959, 268 F.2d 280, was overruled by *Cohen v. Norris*, 9 Cir., 1962, 300 F.2d 24, on authority of *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.ed.2d 492. *Monroe* involved police brutality and unlawful searches and seizures in contravention of due process. *Cohen* likewise involved unreasonable search and seizure. As stated by this Court on page 27: "The constitutional right invoked by Cohen in the instant case is the due process clause of that amendment. He claims that he was subjected to an unreasonable search and seizure." The only portion of *Hoffman*, considered unsound by this Court in *Cohen*, was its holding that there must be an allegation of purpose to discriminate

or deprive one of a federal right predicated on an alleged violation of the due process clause. Thus, on pages 29-30, this Court stated:

“In our view *Monroe v. Pape* announces the rule that an allegation of a purpose to discriminate or a purpose to deprive one of any federal right, is not essential to the statement of a claim under §1983 *predicated on an alleged violation of the due process clause of the Fourteenth Amendment*. It is accordingly necessary for us to overrule *in this respect* the contrary holdings in our earlier decisions in *Agnew v. City of Compton* [239 F.2d 226] and *Hoffman v. Halden*, and to disapprove the contrary statement made by way of dictum in *Walker v. Bank of America* [268 F.2d 16].” (Italics and bracketed matter added.)

In *Rhodes v. Meyer*, 8 Cir., 1964, 334 F.2d 709, cert. den., 13 L.ed.2d 186, it was stated on page 718:

“In regard to the categories of officialdom previously determined immune in *Houston*, proper judicial administration requires us to follow such determinations unless there since has been a significant change in the applicable law. Plaintiff relies upon *Monroe v. Pape*, 365 U.S. 167, 87 S.Ct. 473, 5 L.Ed. 2d 492 (1961), for the contention that none of the defendants are immune under the Civil Rights Act and that the law set out in *Houston* is erroneous.”

After quoting from *Rhodes v. Houston*, D.C.Neb., 1962, 202 F.Supp. 624, 629-630, aff'd, 8 Cir., 309 F.2d 959, cert.den., 372 U.S. 909, 83 S.Ct. 724, 9 L.ed.2d

719, the concluding sentence of which was, "This court, therefore relies upon its own reading of that case [*Monroe v. Pape*], and concludes that it has no effect upon the doctrine and is not here in point.", the Court of Appeals said [334 F.2d at p. 718]:

"This court has also since made a survey of the cases citing *Monroe* to see what effect, if any, it may have on the traditional concepts of immunity. We find that there is overwhelming support that judicial immunity and its derivative quasi-judicial immunity have not been affected by *Monroe*. See *Harvey v. Sadler*, 9 Cir., 331 F.2d 387 (1964); *Agnew v. Moody*, 9 Cir., 330 F.2d 868 (1964) (citing *Houston* with approval); *Ray v. Huddleston*, W.D.Ky., 212 F. Supp. 343, aff'd, 6 Cir., 327 F.2d 61 (1964); *Crawford v. Zeitler*, 6 Cir., 326 F.2d 119 (1964); *Duzynski v. Nosal*, 7 Cir., 324 F.2d 924 (1963) (citing *Houston* with approval); *Hurburt v. Graham*, 6 Cir., 323 F.2d 723 (1963); *Sires v. Cole*, 9 Cir., 320 F.2d 877 (1963); *Nesmith v. Alford*, 5 Cir., 318 F.2d 110 (1963); *Weller v. Dickson*, 9 Cir., 314 F.2d 598 (1963); *Kostal v. Stoner*, 10 Cir., 292 F.2d 492 (1961); *Basista v. Weir*, W.D.Pa., 225 F. Supp. 619 (1964); *Norton v. McShane*, 5 Cir., 332 F.2d 885 (1964).

". . . The court properly determined all defendants to be immune from actions such as that alleged, and plaintiff's complaints were properly dismissed for failure to state a claim upon which relief could be granted."

This is not a case of alleged police brutality such as was involved in *Monroe v. Pape*, *supra*, 365 U.S. 167; nor a case of unwarranted search and seizure, coupled with assault on plaintiff's person, such as was involved in *Cohn v. Norris*, *supra*, 300 F.2d 24; nor a case of a prosecuting attorney, acting as police and seeking to intimidate a 16-year-old female by trick and deceit into confession to the crime of murder and without being informed of her right to counsel, etc., such as was involved in *Robichaud v. Ronan*, 9 Cir., 1965, 351 F.2d 533—cases cited and relied on by appellant. None of these decisions involved discretionary action of a state administrative official, such as appellee Glasner, California State Kosher Food Law Representative. Each and every act charged against appellee Glasner was and is "within the outer perimeter of [his] line of duty" and he has and is entitled to immunity from the fear of civil suits for damages in regard thereto. (*Barr v. Mateo*, *supra*, 360 U.S. 564, 575. See also pp. 570-572.)

The basic and fundamental reasons for governmental officer's immunity in performing the discretionary duties annexed to his office here are present. Under numerous decisions, some of which are cited hereinabove, that immunity sustains the trial court's judgment of dismissal.

III.

Pleading Conclusions of Law.

While this basis does not appear to have been one relied upon by appellee Glasner, it is the third and last reason contained in the trial court's specified reasons for the judgment of dismissal. At the outset, it may be noted that the record does not show that appellant requested, desired or wanted any leave to amend. Presumptions are in favor of the trial court's actions. Appellant does not suggest how or in what manner he could further amend his pleading so as to state any claim upon which relief could be granted against this appellee.

Even under the most liberal view of pleading, the plaintiff cannot plead or rely upon mere conclusions of law. There must be sufficient supporting allegations of fact to sustain the adequacy of a pleading for claimed redress under the Civil Rights laws. (See: *Birnbaum v. Trussell*, 2 Cir., 1965, 347 F.2d 86, 89-90, citing and quoting from *Powell v. Workmen's Compensation Bd. of State of New York*, 2 Cir., 1964, 327 F.2d 131, 137; *International Harvester Company v. Kansas City*, 10 Cir., 1962, 308 F.2d 35, 37-38, cert.den. 371 U.S. 948, 83 S.Ct. 503, 9 L.ed.2d 498; *Halliburton Company v. Norton Drilling Company*, 5 Cir., 1962, 302 F.2d 431, 435 [3], cert. den. 374 U.S. 829, 83 S.Ct. 1870, 10 L.ed.2d 1052.)

It is unnecessary further to discuss this feature since it appears that the trial court's judgment correctly was had under either or both point I, *supra*, appellant individual's lack of standing to sue for alleged interference with corporation's business, and point II, *supra*, immunity of appellee Glasner, California State Kosher Food Law Representative.

CONCLUSION.

For the reasons and on the authorities herein contained, it is respectfully submitted that the judgment should and must be affirmed as to appellee Glasner.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WAYNE VEATCH

Attorney

APPENDIX.

"California State Personnel Board Specification for Class of Kosher Food Law Representative

"Definition:

"Under the direction of the Chief, Bureau of Food and Drug Inspections, Department of Public Health, to carry out the statewide program of investigation and inspection in connection with the enforcement of the State Kosher Food Law; and to do other work as required.

"Typical Tasks:

"As assigned, in the major metropolitan areas of the State, initiates and carries out a field inspection program designed to secure understanding of and compliance with the State Kosher Food Law; visits and inspects meat and poultry markets offering kosher products for sale to assure that such products have been properly identified, labeled, segregated, advertised, and otherwise handled in a manner consistent with orthodox Hebrew religious ritual and custom; inspects establishments such as delicatessens, restaurants, catering firms, and rest homes purveying kosher foods to see that products sold as kosher are, in fact, kosher and that they have been processed and served in an manner and with dishes, utensils, and vessels prescribed by Hebrew law and customs; makes field surveys to determine that kosher foods are properly prepared, stored, processed, labeled, and advertised; meets with and advises interested persons such as kosher meat and poultry packers, wholesalers, retailers, and restaurateurs on appli-

cation of the State Kosher Food Law and on proper practices to follow to insure compliance with this law; confers with violators of the Kosher Food Law in an effort to secure voluntary compliance with its provisions; conducts field investigations of complaints regarding kosher foods alleged to have been prepared, packaged, sold, or advertised in violation of the State Kosher Food Law; conducts investigations, gathers, assembles, and reports facts and evidence; assists in the preparation of cases for prosecution when necessary; works cooperatively with representatives of other governmental agencies including the State and Federal Departments of Agriculture and local law enforcement officials; prepares reports of field activities."